

# Test Your Environmental Law I.Q.: Can Relying on Government Advice Excuse an Environmental Violation?



## SITUATION

A farmer gets a licence to build a water supply system on his farm. The system's original plan calls for the construction of a metre high berm. But based on various factors, the farmer now believes that a shorter berm would be more appropriate. He discusses the proposed modification to the plan with an environmental official, explaining the reasoning for a change to the berm's height. The official orally agrees to the modification. But he doesn't alter the farmer's licence to reflect the change. After the farmer builds the modified berm, he's charged with violating the *Water Resources Act*. His defence: a government official told him that he could deviate from the berm's original design.



## QUESTION

**Should the court hold the farmer liable for the violation'**

- A. No, because the violation was the result of officially induced error.
- B. No, because he exercised due diligence.
- C. Yes, because he violated the environmental law.
- D. Yes, because the official's approval wasn't in writing.

## ANSWER

**A. The farmer violated the terms of his licence when constructing the berm only because he relied on reasonable advice from an environmental official. Thus, the defence of officially induced error applies.**

## EXPLANATION

There are several kinds of defences to an environmental violation. One defence is called 'officially induced error' and it applies to situations in which a company or individual asks a government official about the legality of a contemplated action and relies in good faith on that official's advice. This scenario, which is based on a case from Alberta, illustrates this defence in action.

The Alberta Provincial Court explained that, to successfully make out an officially induced error defence, a defendant must prove that he:

- Considered his legal position;
- Consulted an appropriate official;
- Obtained reasonable advice from that official; and
- Relied on that advice.

In this case, the farmer considered his legal position as to deviating from his licence regarding the berm's construction. He discussed the proposed changes with an environmental official, who told him that he didn't have to construct the berm as originally designed. The farmer relied on that advice when building the shorter berm. So the court ruled that the farmer's failure to construct the berm based on the original plan was the result of officially induced error.

**Insider Says:** For more information on the defence of officially induced error, see 'Dealing with Regulators: Can You Be Prosecuted for Actions that a Government Official Okayed''

## WHY WRONG ANSWERS ARE WRONG

**B is wrong** because there's no indication that the farmer took all reasonable steps to comply with the law or the terms of his licence as required by due diligence. In fact, the farmer *didn't* try to comply with his licence as to the construction of the berm. Rather, he sought permission to deviate from the berm's original design as included in his licence.

**C is wrong** because the fact the farmer violated environmental law isn't the end of the discussion. If a defendant commits an environmental violation because he reasonably relied on advice from an appropriate government official, he may be

able to prove officially induced error and thus avoid liability for the violation. Here, the farmer's claim is that his violation of the terms of his licence was the result of his reliance on the environmental official's advice that he could modify the construction of the berm.

**D is wrong** because an official's advice doesn't have to be in writing for the defence of officially induced error to apply. Yes, it would be much easier for the farmer to prove that defence if the environmental official had modified that terms of his licence in writing to reflect the change in the berm's height. But the defence doesn't require written advice.

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*R. v. Starosielski*, [2001] ABPC 208 (CanLII), Nov. 16, 2001